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Supreme Court, U.S.
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No. 04-70

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER EXXON CORPORATION

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QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts with diversity jurisdiction over the individual claims of named plaintiffs to exercise supplemental jurisdiction over the claims of absent class members that do not satisfy the minimum amount-in-controversy requirement of 28 U.S.C. § 1332?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following parties are respondents in this proceeding:

Paul Bove
Martin I. Cook
George Dalton
Richard P. Durishin
Alberto Gonzalez
G.G.S.K., Inc., d/b/a Trail Exxon
G.G.S.K. 1 d/b/a Northlake Exxon
Lee-Langley Corporation
Robert Lewis, Inc. d/b/a North Stuart Exxon
R. William McGillicuddy
John Pinder
Rylans Enterprises
Williston Center Autocare, Inc.
David Wise

and all similarly situated persons.

Exxon Corporation is now known as Exxon Mobil Corporation. There is no parent corporation or publicly held corporation that has a 10% or greater ownership interest in Exxon Mobil Corporation.

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OPINIONS BELOW

The panel opinion of the court of appeals is reported at 333 F.3d 1248 (App. 67a-92a). The order of the court of appeals denying the petition for rehearing en banc, accompanied by the dissenting opinion of Judges Tjoflat and Birch, is reported at 362 F.3d 739 (App. 1a-66a). The district court's order and opinion entering final judgment for the class representatives only, denying the motion to enter final judgment for the class, and certifying the case for interlocutory review is reported at 157 F. Supp. 2d 1291 (App. 95a-156a).

STATUTE AND RULE INVOLVED

28 U.S.C. § 1367 and Federal Rule of Civil Procedure 23 are reproduced at App. 246a-254a. 28 U.S.C. § 1332 provides in pertinent part:

> Diversity of citizenship; amount in controversy; costs
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States. . . .

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 11, 2003. App. 68a. Petitioner Exxon Corporation ("Exxon") timely filed a petition for rehearing and rehearing en banc, which was denied on March 15, 2004. App. 2a. Petitioner filed a motion for extension of time with Justice Anthony M. Kennedy on May 10, 2004. Justice Kennedy granted petitioner an extension of time up to and including July 14, 2004, to file a petition for certiorari. This Court granted the petition for certiorari on October 12, 2004, Joint Appendix

("JA") 8, 9. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The question presented is whether in a class action, federal courts with diversity jurisdiction over the claims of named class representatives also have supplemental jurisdiction, see 28 U.S.C. § 1367, over the claims of unnamed class members who fail to comply with the minimum-amount requirement of 28 U.S.C. § 1332.[1] Construing § 1332, this Court long ago held that federal courts with diversity jurisdiction do not have either original or supplemental jurisdiction over such noncompliant class members. See *Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973). In enacting 28 U.S.C. § 1367, Congress authorized federal courts that "have original jurisdiction" to exercise supplemental jurisdiction over other claims that are part of the same case or controversy. But, a federal court does not "have original jurisdiction" over a class action when the class includes unnamed members who do not meet the minimum-amount requirement, see, *e.g.*, *Zahn*, 414 U.S. at 301; *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267, 267-68 (1806), *overruled in part on other grounds by Louisville, Cincinnati, & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844). Thus, the text of § 1367 makes clear that a federal court cannot exercise supplemental jurisdiction in such a case.

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[1] Section 1332 authorizes federal courts to exercise diversity jurisdiction only if (a) the "matter in controversy" exceeds a specified sum, and (b) there is complete diversity of citizenship between the named plaintiffs and defendants. 28 U.S.C. § 1332. This case involves the first of these requirements which, throughout this brief, is referred to as the "minimum-amount requirement," the "amount-in-controversy requirement" or the "jurisdictional-amount requirement." Cases sometimes refer to this requirement as the "matter-in-controversy rule." *See, e.g., Zahn* v. *International Paper Co.*, 414 U.S. 291, 301 (1973).

This problem cannot be solved by pretending that a diversity class action is nothing more than an action filed by named plaintiffs who satisfy the minimum-amount requirement, followed by the addition of unnamed plaintiffs who do not. Class certification is not the equivalent of the mass joinder or intervention of plaintiffs; indeed, Federal Rule of Civil Procedure 23(a) specifies that class certification is appropriate only when the "joinder of all plaintiffs is impracticable." Section 1367 does not address, let alone authorize, supplemental jurisdiction in class actions. In any event, in diversity cases, the addition of a noncompliant plaintiff *destroys* the court's original diversity jurisdiction. Section 1367 cannot logically be interpreted to provide that the addition of a party simultaneously authorizes supplemental jurisdiction *and* eliminates the original diversity jurisdiction on which that supplemental jurisdiction must be based. And even assuming that there is some remaining ambiguity in the text, the legislative history conclusively demonstrates that in enacting § 1367, Congress intended to preserve *Zahn*. The House Report, which was adopted in full by the Senate, expressly states that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions," and then cites to *Zahn*. H.R. Rep. No. 101-734, at 28-29 & n.17 (1990) ("House Report").

The court below incorrectly assumed that § 1367(a) authorizes diversity courts to exercise supplemental jurisdiction over unnamed class members whose claims do not satisfy § 1332. It then found significant that § 1367(b) prohibits the exercise of supplemental jurisdiction over parties who join or intervene in an action under Federal Rules of Civil Procedure 19 and 24, but does not mention Rules 23 and 20. Dispositively, as noted, § 1367(a) does *not* authorize diversity courts to exercise supplemental jurisdiction over noncompliant class members or parties whose presence would destroy the court's original diversity jurisdiction, thus there was no need to mention Rules 23 and 20 in § 1367(b). In

addition, on the lower court's interpretation of § 1367(b), Congress forbid diversity courts to exercise supplemental jurisdiction over actions in which noncompliant plaintiffs were (a) initially named in the complaint or (b) joined or intervened pursuant to Rules 19 and 24, but authorized diversity courts to exercise supplemental jurisdiction when a class including noncompliant plaintiffs is certified or when noncompliant plaintiffs are added after the complaint is filed under Rules 20 and 23. This unlikely construction would effectively overrule *Zahn* and *Strawbridge*, as well as the descendants of *Strawbridge*, despite Congress's explicit contrary intention. The fundamental flaw in this statutory interpretation is reflected in the absurdity of the consequences it generates.

Only petitioner's interpretation, moreover, comports with established principles of statutory interpretation. This Court has pointed to Congress's consistent choice to cut back on the federal courts' diversity jurisdiction and Congress's settled acceptance of this Court's interpretation of § 1332, and thus required an "express statement" of Congress's intent to alter and expand § 1332. See *Zahn*, 414 U.S. at 302. And, the Court's respect for state sovereignty and congressional supremacy already requires a narrow construction of any federal statute delineating the federal courts' diversity jurisdiction. Add to these principles of construction a suitable reluctance to assume that Congress silently overruled *Zahn*, *Strawbridge* and other settled precedent of this Court, and it is evident that § 1367 should be narrowly construed to preserve these decisions and to implement the express will of Congress. The court below did not have jurisdiction over this action.

In these circumstances, the judgment below should be vacated. The courts below never had jurisdiction over this action. The entire course of the litigation was infected by the unlawfully-defined class, and the judgment itself was

predicated on the unlawful class definition and on proof that was itself based on the unlawful class definition.

STATEMENT OF THE CASE

1. Plaintiffs here represent a class of approximately 10,000 current and former Exxon motor fuel dealers. They alleged that in 1982 Exxon initiated a marketing program known as the Discount for Cash ("DFC") program and that in administering that program, Exxon overcharged them for wholesale motor fuel purchases between March 1, 1983 and August 31, 1994. Plaintiffs asserted that these overcharges constituted breaches of Exxon's agreements with its dealers. App. 69a.

Each Exxon dealer operates under a separate contract (called a "Sales Agreement") with Exxon. App. 69a, 223a. Each Sales Agreement contains an open-price term, under which the individual dealer is obligated to pay Exxon's "established dealer price" at the time of delivery. Sales Agreement, art. 4; App. 88a & n.16. There is no national dealer price; instead, Exxon establishes the wholesale price for individual dealer sales by continually evaluating market conditions to estimate the wholesale prices charged by Exxon's competitors in each local market. As a result, dealer prices vary from market to market; and, because they are estimates, they can be below, at, or above the "true" wholesale market price for any given dealer at any given time.

The DFC program was established to encourage Exxon dealers to implement a price structure that would, in turn, encourage retail customers to use cash rather than a credit card to pay for motor fuel, by charging customers using cash a few cents less than customers using credit cards. App. 69a. Under the DFC program, Exxon changed its pricing system so that dealer prices were set in each market by reference to the local wholesale "cash" price (rather than the credit price),

charged dealers a 3% processing fee on all credit card sales, and urged (but did not require) dealers to establish a two-tiered retail price structure, offering a discount to customers paying cash. *Id.*

2. In May 1991, the dealers filed a class action against Exxon in federal district court; the stated basis for federal court jurisdiction was diversity of citizenship under 28 U.S.C. § 1332. The dealer class alleged that the DFC program obligated Exxon to offset the mandated credit card fees by reducing wholesale gasoline prices "on average" for the class "as a whole." The class alleged that this contractual obligation was imposed under the dealers' individual Sales Agreements. The class further asserted that under the DFC program, Exxon reduced the wholesale price by 1.7 cents per gallon for six months, but stopped providing this reduction in March 1983 without informing its dealers. The dealers claimed that by ceasing to reduce wholesale prices to offset the 3% credit card fee, Exxon breached its contractual obligation to the class as a collectivity and, "on average," overcharged the dealers for gasoline during the class period. App. 109a-110a, 161a.

Plaintiffs sought class certification. Exxon opposed the motion on the grounds that the varying circumstances of each dealer's sales – including regional variations in market and pricing conditions – as well as individual dealer reliance on alleged representations, individual damages determinations, and the existence of individualized affirmative defenses, made certification impermissible under Rule 23(b)(3). The magistrate judge rejected Exxon's arguments, App. 235a, and recommended certification of a class of all dealers who were party to a Sales Agreement at any time during the DFC program, *id.* at 238a. The district court affirmed. *Id.* at 220a.

Exxon also asserted that the court lacked jurisdiction over class members who did not satisfy the requirements of § 1332. The district court rejected this argument and held that

it had jurisdiction over all class members under § 1367. App. 212a-214a.

After certification, the case was tried to a hung jury in September 1999. It was retried in January 2001, resulting in a jury verdict in favor of the dealer class. The jury found that Exxon had a contractual obligation to reduce prices "on average" to the class as a whole. App. 161a, 162a.

The district court denied Exxon's post-trial motions seeking to overturn the verdict, and awarded pre-judgment interest and compensatory damages. App. 155a-156a. The court later entered final judgment under Rule 54(b) *for the named class representatives* based on a computation of the "on average" damage figure. *Id.* at 93a-94a. The court denied, however, the dealers' motion for entry of a final judgment with respect to the class. The court concluded that it could not enter an aggregate damages award because the jury had not awarded aggregate damages, and therefore that final judgment could be entered only for the class representatives. *Id.* at 155a. The court established an ad hoc claims process through which Exxon could contest individual class members' claims for compensatory damages. *Id.*

The court also certified the case for interlocutory review under 28 U.S.C. § 1292(b), asking the court of appeals to resolve the following substantial questions: "(1) whether [the court] properly exercised supplemental jurisdiction over class members whose claims did not meet the jurisdictional minimum amount in controversy requirement; and (2) whether an aggregate compensatory and prejudgment interest award could be entered for the class before the claims administration process." App. 68a.

3. The Eleventh Circuit affirmed the district court order. First, it addressed whether the district court had supplemental jurisdiction over the claims of class members who failed to meet the minimum amount-in-controversy requirement of § 1332(a). Relying on what it characterized as the plain

language of the supplemental jurisdiction statute, the court held that § 1367 authorizes a district court entertaining a diversity class action to exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional minimum amount-in-controversy requirement. App. 72a-74a.

The court next affirmed the district court's refusal to enter an aggregate judgment for the dealers based on the jury verdict. App. 79a. The court acknowledged that "the determination of the amount that each dealer was overcharged during the class period must take place on an individual basis, taking into account the amount of compensatory damages to which each dealer is entitled." *Id.* at 78a. In light of the determinations to be made in the individual claims process, moreover, the court affirmed Exxon's right to participate in the claims process and to raise its claims of entitlement to set-offs. *Id.* at 80a, 83a.

Finally, the court affirmed the certification of the class under Rule 23(b)(3). The court rejected Exxon's arguments that "there were individual issues inherent in each dealer's breach of contract claim and its own affirmative defenses." App. 85a. The court held that because the dealer agreements were "materially similar and Exxon purported to reduce the price of wholesale gas for all dealers," its "duty of good faith was an obligation that it owed to the dealers as a whole." *Id.* Moreover, while the court recognized that there were numerous individualized damages issues that potentially required 10,000 hearings to resolve, the court held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Id.* at 86a.

4. Exxon filed a petition for rehearing and rehearing en banc, which the Court denied. Judge Tjoflat, joined by Judge Birch, dissented from the denial of rehearing on the question whether the district court, with jurisdiction under § 1332, had the power to exercise supplemental jurisdiction over unnamed

class members who failed to meet the amount-in-controversy requirement for federal diversity jurisdiction.

SUMMARY OF ARGUMENT

The decision below ignores the best reading of the statutory text, the conclusive legislative history, and numerous principles of statutory construction. Section 1367(a) authorizes a federal district court to exercise supplemental jurisdiction only if it "ha[s] original jurisdiction." This Court has already held, in interpreting § 1332, that a federal court sitting in diversity does not "have original jurisdiction" over a class action where unnamed members of the class fail to satisfy the amount-in-controversy requirement. See *Zahn*, 414 U.S. at 301. The prerequisite for the exercise of supplemental jurisdiction, accordingly, is missing here.

But, the lower courts opined, the district court could assume that named plaintiffs had filed an action that complied with § 1332 and then added plaintiffs with noncompliant claims. In the Eleventh Circuit's view, in these circumstances, § 1367(a) would authorize supplemental jurisdiction over the added plaintiffs. This is wrong for several reasons.

First, certification of a class is not the equivalent of the massive joinder or intervention of plaintiffs; instead, a class action is a representative action. What this means is that unnamed parties do *not* join or intervene in a class action; indeed, Federal Rule of Civil Procedure 23(a) states that class certification is appropriate only when "joinder of all members is impracticable." Nothing in § 1367(a) authorizes a court with diversity jurisdiction over named plaintiffs to exercise supplemental jurisdiction over a *class* (as opposed to plaintiffs who actually join or intervene in a case).

Second, a court that "ha[s] original jurisdiction" under § 1332 *loses* original jurisdiction at the moment a party who does not satisfy the minimum-amount requirement is added to

the case. It makes little sense to read § 1367(a) to provide that the same act – class certification – simultaneously effectuates supplemental jurisdiction and destroys the original jurisdiction that is the basis for supplemental jurisdiction. This point is effectively illustrated by contrasting federal-question and diversity jurisdiction. Federal-question jurisdiction is not affected by the addition of parties or claims over which the court *lacks* original jurisdiction; the court's power persists. In contrast, a court's diversity jurisdiction is *destroyed* by the addition or joinder of noncompliant plaintiffs, and those plaintiffs must be dismissed. Thus, § 1367(a) authorizes a court with original, federal-question jurisdiction to exercise supplemental jurisdiction over all related claims and a court with diversity jurisdiction to exercise supplemental jurisdiction over all related claims that are consistent with § 1332. But, § 1367(a) cannot be read to authorize a court with diversity jurisdiction to exercise supplemental jurisdiction over parties whose presence eliminates original jurisdiction.

This logical reading of the statutory text has the substantial, additional virtue of comporting with congressional intent, as expressed both explicitly and implicitly. The House Report, which was adopted in full by the Senate, expressly states that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley* [v. *United States*, 490 U.S. 545 (1989)]," and then *cites* this Court's decision in *Zahn*. House Report at 28-29 & n.17. Fearing that *Finley* might be broadly interpreted to prohibit *all* supplemental jurisdiction not expressly authorized by statute and knowing that *Finley* prohibited pendent-party jurisdiction even in federal-question cases, Congress enacted § 1367 to provide the necessary statutory authorization for supplemental jurisdiction and to make clear that pendent-party jurisdiction is permitted in federal-question cases – *viz.*,

to overrule *Finley*. Congress preserved this Court's established interpretation of § 1332.

Further evidence of § 1367's intended scope is found in § 1367(b). There Congress prohibitied the exercise of supplemental jurisdiction "over claims by plaintiffs against persons made parties under Rules 14, 19, 20, or 24," and "over claims by persons proposed to be joined as plaintiffs under Rule 19 . . . or seeking to intervene as plaintiffs under Rule 24" whenever exercising supplemental jurisdiction "would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b). Congress sought simultaneously to authorize supplemental jurisdiction, and to prevent the circumvention of § 1332.

On the Eleventh Circuit's view of § 1367(b), however, Congress authorized a court with diversity jurisdiction to exercise supplemental jurisdiction over noncompliant plaintiffs added to an action pursuant to Rules 23 and 20, but not Rules 19 and 24. So read, § 1367 effectively overrules not only *Zahn*, but also *Strawbridge* and its numerous progeny (in the teeth of legislative history stating that such was *not* Congress's intent). This reading is therefore astonishing and unlikely, particularly in light of the fact that the liberal, inclusive joinder standard in Rule 20 means that it could be used to add the same plaintiffs whose joinder in the complaint or under Rules 19 and 24 would be forbidden. In contrast, petitioner's reading of § 1367 preserves § 1332 by reading § 1367(a) to authorize supplemental jurisdiction only when the court "ha[s] original jurisdiction" over the complaint, and by reading § 1367(b) to forbid supplemental jurisdiction over noncompliant plaintiffs added by other mechanisms. "'[T]here is no canon against using common sense in construing laws as saying what they obviously mean.'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, No. 03-377, slip op. at 12 (U.S. Nov. 30, 2004) (alteration in original).

Finally, numerous common-sense principles of statutory interpretation militate strongly in favor of petitioner's analysis. For decades, Congress has repeatedly limited the federal courts' diversity jurisdiction and approved this Court's narrow constructions of § 1332. Congress's actions and the longevity of this Court's settled interpretations of § 1332 have led this Court to require "some express statement of [Congress's] intention" before it will find those settled interpretations overruled. *Zahn*, 414 U.S. at 302. Section 1367 contains no such statement; indeed, its text and history require the contrary conclusion.

Moreover, the federal courts' respect for state sovereignty (as reflected in the exclusive power of state courts definitively to construe state law) and for Congress's supremacy in defining federal-court jurisdiction has given rise to a general rule of narrow construction of statutes delineating federal-court jurisdiction. See *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969); *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Both concerns – founded in our federalism – support petitioner's limiting construction of § 1367, while the Eleventh Circuit's interpretation would result in the litigation of virtually all diversity-based class actions in federal court, in contravention of Congress's express intent.

One final defect in the interpretation of § 1367 adopted by the courts below is, as noted *supra*, that it entails that Congress *sub silentio* overruled *Zahn*, *Strawbridge*, and numerous other cases interpreting § 1332. Lower courts and, indeed, this Court should be reluctant to presume that Congress has legislatively reversed a ruling of this Court – and most certainly should not do so when Congress has *approved* that decision. *Zahn* remains the law, and § 1367 does not authorize courts with diversity jurisdiction to exercise supplemental jurisdiction over a class including unnamed plaintiffs whose claims do not satisfy the minimum-amount requirement of § 1332.

The courts below lacked any power to decide this case, and the judgment is, accordingly, void. As a result of the erroneous assertion of subject-matter jurisdiction, this case was litigated on behalf of a class over which the court lacked jurisdiction, and liability and damages were determined and calculated based *solely* on expert testimony wrongly using aggregated data derived from *all Exxon dealers*. The wrongful certification infected the litigation and tactics in this case in numerous ways, altering the settlement calculus and allowing plaintiffs to prove their case using national, aggregated data that might not have been adequate to prove liability and damages for a smaller subset of dealers. Accordingly, the judgment below must be vacated in its entirety.

ARGUMENT

I. FEDERAL COURTS EXERCISING DIVERSITY JURISDICTION MAY NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER UNNAMED PLAINTIFFS IN CLASS ACTIONS WHOSE CLAIMS DO NOT SATISFY § 1332'S AMOUNT-IN-CONTROVERSY REQUIREMENT.

The Eleventh Circuit held that § 1367 authorizes federal district courts exercising diversity jurisdiction to assert supplemental jurisdiction over unnamed plaintiffs in class actions whose claims fail to satisfy § 1332's amount-in-controversy requirement. Put differently, the court concluded that § 1367 legislatively overruled this Court's decision in *Zahn*, which had held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." 414 U.S. at 301. The decision below is wrong because it contravenes the text and structure of § 1367, established interpretive principles governing jurisdictional statutes, and express congressional intent and purpose.

A. The Text And Structure Of § 1367 Do Not Authorize Supplemental Jurisdiction In This Setting.

1. The court below relied on the "plain language" of § 1367 in concluding that district courts with diversity jurisdiction may exercise supplemental jurisdiction over unnamed class members whose claims do not satisfy the amount-in-controversy requirement. App. 74a. According to the court, the plain language of a statute that never once refers to class actions fundamentally altered a decades-old rule regarding the propriety of their adjudication in federal court. In fact, the language of the statute holds no such "plain meaning," and its better reading precludes the exercise of supplemental jurisdiction in this case. The court of appeals simply did not read carefully enough.

Section 1367 codifies, with changes, the doctrines of pendent-claim, pendent-party and ancillary jurisdiction.[2] In pertinent part, § 1367(a) provides that:

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[2] The contours of these doctrines were not entirely clear, but certain general observations can be made that illuminate the origins of § 1367. Cases involving a federal-question claim joined with a related state-law claim against the same defendant implicate pendent-claim jurisdiction. *See United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725-27 (1966). Pendent-claim jurisdiction was not applied in diversity cases because when the source of the court's original jurisdiction is § 1332, additional claims against the same defendant necessarily fulfill § 1332's requirements.

Pendant-party jurisdiction is implicated when a plaintiff seeks to add a state-law claim that involves the joinder of additional parties to its civil action based on federal-question or diversity jurisdiction. Prior to the enactment of § 1367, this Court had twice refused to apply pendant-party jurisdiction in federal-question cases on the facts presented. *See Aldinger* v. *Howard*, 427 U.S. 1, 6-19 (1976); *Finley* v. *United States*, 490 U.S. 545, 546-47, 556 (1989). Section 1367 reversed *Finley*, making clear that pendent-party jurisdiction is now permitted in federal-question cases. Pendent-party jurisdiction was not applied in cases arising in diversity jurisdiction, because it was precluded by the requirements of § 1332. *See* James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L. Rev. 109, 129 (1999).

Ancillary jurisdiction was applied to related claims asserted in a federal civil action (whether by plaintiffs, defendants, or intervenors of right) "after the filing of the original complaint." Paul M. Bator et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1685 n.1 (3d ed. 1988). In certain circumstances, it allowed the addition of parties as well as claims. *See Owens Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374-77 (1978) (ancillary jurisdiction "typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court"). Prior to § 1367, ancillary jurisdiction was applied in diversity actions only when it was deemed consistent with the requirements of § 1332. *Id.*

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

No federal question is presented in this case; the district court was exercising diversity jurisdiction under 28 U.S.C. § 1332. Accordingly, the first interpretive question is whether plaintiffs filed a "'civil action of which the district courts of the United States have original jurisdiction.'" See, *e.g.*, *City of Chi.* v. *International Coll. of Surgeons*, 522 U.S. 156, 166 (1997) (citation omitted).

In decisions dating to the early nineteenth century, this Court has consistently held that in diversity cases, the federal courts have original jurisdiction only where plaintiffs' claims satisfy § 1332's minimum-amount requirement. See *Strawbridge*, 7 U.S. (3 Cranch) at 267-68; *Clark* v. *Paul*

Gray, Inc., 306 U.S. 583, 589 (1939); *Pinel* v. *Pinel*, 240 U.S. 594, 596 (1916); *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911). This requirement applies with full force in the class-action setting. See *Snyder*, 394 U.S. at 336; *Zahn*, 414 U.S. at 294 ("'[w]hen two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount'").[3]

Indeed, even the dissenters in *Zahn* agreed that the district court did not have *original* jurisdiction over unnamed class members whose claims did not satisfy the minimum-amount requirement. See 414 U.S. at 302-12 (Brennan, J., dissenting) (asserting that the district court had "ancillary jurisdiction" over the claims of unnamed class members that do not satisfy the minimum-amount requirement). It is, accordingly, clear that the federal district court did not have *original* jurisdiction over plaintiffs' class action, because the claims of unnamed class members did not satisfy the minimum-amount requirement.

The courts below found jurisdiction only by ignoring that this case was filed as a class action. In their view, a district court should pretend that the named plaintiffs who satisfy the minimum-amount requirement have filed a civil action on their own behalf – an action over which the court would have had original diversity jurisdiction. App. 75a. Then, the court should treat the unnamed class members whose claims do not

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[3] In *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921), *overruled in part on other grounds by Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941), the Court decided that a federal court has subject-matter jurisdiction in a diversity case even if some unnamed class members share the defendant's citizenship so long as there is complete diversity between the class representatives and the defendant. *Id.* at 359. But, the Court has never deviated from its view that under § 1332, each plaintiff's claim is a "matter in controversy" that must satisfy the minimum-amount requirement of the statute.

satisfy the minimum-amount requirement as if they were joined in the action. *Id.* On this view, § 1367 authorizes the court to exercise supplemental jurisdiction over those joined plaintiffs.

This interpretation of § 1367(a) is plainly wrong for two, independent reasons. First, nothing in either § 1367(a) or Rule 23 (which provides the standards for class certification) suggests that a class action can be treated as a two-step process of individual lawsuit and massive joinder. No such contrived process can be squared with the unique inquiry required under Rule 23. Second, this broad reading of § 1367(a) is wrong because a federal court's original diversity jurisdiction over a civil action is destroyed – and thus cannot form the foundation for supplemental jurisdiction – when parties whose claims do not satisfy § 1332 are joined.

(a) The Eleventh Circuit's reading of § 1367 reflects a fundamental misunderstanding of the nature of class actions. The court seeks to treat class certification as if it is identical to the joinder or intervention of additional plaintiffs. This is wrong. Both the process and the consequences of class certification demonstrate that it is fundamentally different from joinder and intervention and that § 1367 does not authorize supplemental jurisdiction over unnamed class members whose claims do not satisfy § 1332.

Unlike other civil actions, a class action lawsuit begins with the filing of a complaint that includes class allegations. Such a complaint is governed by Rule 23, and is treated as a class action unless and until the court declines to certify. See Fed. R. Civ. P. 23 advisory committee's note on 1966 amendment subdivision (c)(1). The filing of the class-action complaint has an immediate legal effect on all putative class members, not just the named plaintiffs. The statute of limitations is tolled, see *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 547-49 (1974); and class counsel owes fiduciary duties to all putative class members, even before the class is certified, see *In re General Motors Corp. Pick-Up Truck Fuel*

Tank Prods. Liab. Litig., 55 F.3d 768, 801 (3d Cir. 1995). From the outset, accordingly, a class action is fundamentally different from an individual action subject to joinder by absent parties at some point in the future.

What distinguishes the class action device is its potential to bind individuals to a litigated result even though those individuals take no part in the litigation. As this Court observed long ago, a class action is a "representative suit," litigated by class representatives on behalf of all. *Hansberry* v. *Lee*, 311 U.S. 32 (1940):

> To the[] general rule[] [that a person is not bound by a judgment in litigation in which he is not a party] there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. [*Id.* at 40 (citing *Smith* v. *Swormstedt*, 57 (16 How.) U.S. 288 (1853).]

See also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 847 (1999) (in a class action, the "legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary"); *id.* at 846 (recognizing "[t]he inherent tension between representative suits and the day-in-court ideal"). Specifically, unnamed parties are bound by the results if the class action is mandatory (*i.e.*, if no person may opt out of the class), as in Rule 23(b)(2) classes seeking injunctive relief. Unnamed class members are also bound if they fail to opt out of a class that is not mandatory, as in Rule 23(b)(3) classes seeking monetary relief. See *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

Because a class action is a representative suit, it can proceed only if the class is sufficiently cohesive to permit

absent class members to be bound to the result of litigation in which they do not participate. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997); *Ortiz*, 527 U.S. at 846-47. Thus, Federal Rule of Civil Procedure 23 imposes a number of prerequisites for class certification through which the court assesses the cohesiveness of the class and the adequacy of the class representative.[4] This process and its substantive standards distinguish class action from other types of multi-party actions.

Critically, unnamed class members do not "join" or "interven[e]" in a class action within the meaning of § 1367(a). Indeed, by definition and federal rule, a class may not be certified unless "joinder of all members is impracticable," Fed. R. Civ. P. 23(a), making clear that unnamed class members cannot be characterized as having joined or intervened in an extant civil action simply because a class has been certified. Rule 23 itself thus makes clear that a class action complaint cannot be re-packaged as an individual complaint to which additional parties are later joined.[5] If joinder were feasible, there would be no class action.[6]

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[4] Rule 23 sets forth detailed requirements for certification. Under Rule 23(a), the inquiry for class certification addresses numerosity, common issues of law and fact, the typicality of the class representatives' claims, and the adequacy of the representation. Under Rule 23(b), the court must also impose different, additional requirements for the so-called limited fund classes of Rule 23(b)(1)(B), injunctive relief classes under (b)(2), and money damages classes under (b)(3). And, in contrast to the most other interlocutory appeal rules, Rule 23 certification is subject to a unique appeals process to ensure that proceeding as a class is justified. See Rule 23(f).

[5] The standards for certifying a class are fundamentally different from the standards for determining whether individual parties and their claims can or must be joined or added under Rules 14, 19, 20, and 24. Rule 14 authorizes a defendant to implead a third-party defendant if such defendant "is or may be liable" for some portion of plaintiff's claim against the original defendant, and further provides that the plaintiff may

The fundamental differences between a class action and joinder and intervention make Congress's failure to mention supplemental jurisdiction over unnamed class members in § 1367(a) notable. In this setting, that omission in combination with the last sentence of § 1367(a) – explaining that supplemental jurisdiction embraces "claims that involve the joinder or intervention of additional parties" – makes clear that § 1367 does *not* contemplate the use of the class-certification mechanism to obtain supplemental jurisdiction over unnamed class members whose claims do not satisfy the minimum-amount requirement.

Simply put a class action is a fundamentally different kind of aggregation – it is a representative action that binds unnamed class members to litigation through neither joinder nor intervention. Section 1367(a) simply does not speak to such representative actions and certainly should not be read to apply to the fundamentally different type of expanded judicial power embodied in a class action.[7]

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assert any claim against the third-party defendant arising out of the same transaction or occurrence that is the subject matter of the plaintiff's original claim. Rule 19 authorizes the joinder of parties essential for the just adjudication of a civil action. Rule 20 authorizes the joinder of plaintiffs or defendants in a single action that involves claims arising out of the same transaction or occurrence "if any question of law or fact common to all these persons will arise." Rule 24 authorizes intervention of right and permissive intervention by putative plaintiffs and defendants.

[6] *See also Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002) (explaining that class certification has different consequences than intervention or joinder and that the rights and responsibilities of unnamed class members are a function of the procedural and substantive context).

[7] Even on plaintiffs' interpretation of § 1367(a), the decision below should be vacated. It is conceded here that the court could acquire "original jurisdiction" within the meaning of § 1367(a) *only* by declining to certify the class for which plaintiffs sought certification. This is because a federal court does not have *original* jurisdiction over a class or representative action in which unnamed class members do not satisfy the

(b) The lower courts' reading of § 1367(a) is wrong for a second, independent reason. Even if class litigation could be treated as an individual action followed by "joinder" of additional parties, § 1367(a) authorizes federal courts to exercise supplemental jurisdiction if, and only if, they already have "original jurisdiction" over the "civil action." In cases based on diversity jurisdiction, federal courts *have original jurisdiction over a civil action* only when the parties are completely diverse and when the plaintiffs' claims meet the minimum-amount requirement in § 1332. See *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 387 (1998). In diversity-based class actions, complete diversity with all unnamed class members is not required, see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 359 (1921), *overruled in part on other grounds by Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941); but a federal court has original jurisdiction over the action only if all class members satisfy the minimum-amount requirement, see *Zahn*, 414 U.S. at 296. In diversity actions, original jurisdiction exists in federal courts if the noncompliant party is dismissed, but such jurisdiction is absent while the noncompliant party remains in the case. It simply makes no sense to read § 1367(a) – which authorizes federal courts to exercise supplemental jurisdiction only when they already have *original* jurisdiction – to

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minimum-amount requirement, *see Zahn*, 414 U.S. at 293-95; *id.* at 304 (Brennan, J., dissenting). To obtain *original* jurisdiction, the court was required either to alter the class definition to exclude members who did not satisfy the requirement or to deny certification to the class (as was done in *Zahn*). Once a court obtains "original jurisdiction" over a diversity action by dismissing from the suit all parties named and unnamed who do not satisfy the minimum-amount requirement, what remains is either (a) a class from which, by definition, noncompliant plaintiffs are excluded, or (b) not a class. On plaintiffs' view, § 1367(a) would authorize noncompliant plaintiffs to join or intervene in such an action as individuals (subject to the restrictions in § 1367(b)), but plaintiffs offer no explanation of how such noncompliant plaintiffs could be part of a certified class.

authorize supplemental jurisdiction over parties whose claims, by definition, eliminate the precondition for supplemental jurisdiction, to wit, the court's *original* jurisdiction.

This is made clear by § 1367's text in two ways. First, § 1367(a) requires that in order to exercise supplemental jurisdiction, the court must "have original jurisdiction." The statute does not authorize a court to exercise supplemental jurisdiction simply because the court has had original jurisdiction at some point in the past. Second, § 1367(a) requires that the court "have original jurisdiction" not just over a particular claim or claims, but over the "civil action." A court sitting in diversity lacks original jurisdiction over a civil action whenever a party who does not comply with § 1332 is part of an action. See, *e.g.*, *Schacht*, 524 U.S. at 389 ("[w]here original jurisdiction rests upon Congress' statutory grant of 'diversity jurisdiction,' this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction").[8]

In this regard, it is critical that under established law, the joinder or aggregation of parties and claims has different implications for a court's "original jurisdiction" in federal-question and diversity "civil actions." The requirement that a civil action arise under federal law, 28 U.S.C. § 1331, is satisfied by the presence of a federal claim, whether or not the action also contains a state law claim. See *International Coll.*

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[8] *See also* App. 58a ("Some courts have held that the requirement of § 1367(a) is satisfied so long as the court has original jurisdiction over *any* of the claims specified in the complaint. However, a subsequent portion of § 1367(a) refers to particular 'claims in the [civil] action' over which the court has original jurisdiction. When Congress wanted to refer to individual claims in a complaint, it knew how to do so; when Congress wanted to refer to the civil action as a whole (encompassing *all* the claims in the complaint), it apparently knew how to do so, as well") (alteration in original).

of Surgeons, 522 U.S. at 166. "[F]ederal claims suffice to make the actions 'civil actions' within the 'original jurisdiction' of the district courts for purposes of removal," and the "presence of related state law claims" does not alter this analysis. *Id.* Similarly, the requirement of 28 U.S.C. § 1336 that the United States be a defendant in the action is fulfilled whenever the United States is a defendant, whether or not other defendants are sued. In both examples, the exercise of supplemental jurisdiction over claims outside the court's original jurisdiction does not defeat original jurisdiction.

In contrast, under the diversity statute, the presence of additional parties or claims can determine whether the court has "original jurisdiction" – *e.g.*, because the parties are not completely diverse or because the claims do not satisfy the amount-in-controversy requirement. If a plaintiff who fails to meet the jurisdictional minimum is part of a suit, the court's original jurisdiction is destroyed unless and until that plaintiff is dismissed. As noted above, a court does not have "original jurisdiction" under § 1332 over a class action filed on behalf of unnamed class members who do not meet the minimum-amount requirement. See *Zahn*, 414 U.S. at 301. The prerequisite for exercising supplemental jurisdiction is therefore unsatisfied. But § 1367(a) does not authorize a diversity court to exercise supplemental jurisdiction even if the class action is treated as an individual action by plaintiffs who satisfy § 1332 to which unnamed noncompliant class members are added. This is because at the moment those noncompliant plaintiffs are added, the court's "original jurisdiction" ceases, which deprives the court of the jurisdictional predicate for the exercise of supplemental jurisdiction over these plaintiffs.

This point is effectively illustrated in the class-action setting. The court does not have original jurisdiction over unnamed class members whose complaints fail to satisfy the minimum-amount requirement. On the Eleventh Circuit's

view, however, at the precise moment original jurisdiction is destroyed by the certification of a class which includes members who do not meet the minimum-amount requirement, supplemental jurisdiction is obtained. But, at the moment such a class is certified, the court does not "have original jurisdiction," so there is no basis for supplemental jurisdiction. The same act, class certification, cannot simultaneously eliminate original jurisdiction and effectuate supplemental jurisdiction.

2. Sections 1367(a) and (b) are, of course, integrated working parts of the same whole. To determine the meaning of statutory text, a court must not only define the words used in that text, but also examine the statutory structure and context. As this Court recently explained, "[s]tatutory construction is a 'holistic endeavor,'" and "'[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Koons Buick Pontiac*, No. 03-377, slip op. at 8. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (in construing a statute, the court examines "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). That is certainly the case here. Petitioner's reading of § 1367(a) is supported by its comfortable fit with § 1367(b), while the lower court's reading of § 1367(a), in conjunction with § 1367(b), produces bizarre results that cannot have been intended by Congress and that dramatically expand federal diversity jurisdiction.

Section 1367(b) provides that where original jurisdiction is founded on diversity:

> the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as

> plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when existing jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332. [28 U.S.C. § 1367(b).]

Section 1367(b) places two types of restrictions on employing supplemental jurisdiction in a diversity case. First, it orders courts not to exercise supplemental jurisdiction over claims *by plaintiffs* against defendants added to a civil action by the operation of Federal Rules of Civil Procedure 14, 19, 20, or 24, if § 1332 would have prevented plaintiffs from suing such defendants at the action's inception.[9] In addition, section 1367(b) says that persons may not join or intervene in a civil action as plaintiffs under Rules 19 and 24 if § 1332 would have prevented them from joining the action at its inception.

These restrictions prevent plaintiffs from using supplemental jurisdiction when doing so "would be inconsistent with the jurisdictional requirements of Section 1332." Pfander, *supra*, at 135. "More than merely confirming a general spirit of cautious restatement, subsection (b) offers strong structural support for [petitioner's] interpretation of the scope of subsection (a)'s grant of supplemental jurisdiction in diversity," which preserves the essential features of § 1332. *Id.*

Section 1367(b) basically preserves the case law developed in connection with the ancillary jurisdiction prior to § 1367's enactment. For example, § 1367(b) prohibits plaintiffs suing in diversity from using supplemental jurisdiction to file a claim against a defendant impleaded under Rule 14 if the claim could not have been asserted in the initial complaint. It

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[9] The type of joinder or intervention authorized by each Rule is described briefly in note 5 *supra*.

reflects this Court's decision in *Owens Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), which holds that a plaintiff cannot sue a single defendant of diverse citizenship, wait for that defendant to implead a third party, and then employ ancillary jurisdiction to make a claim against the impleaded third party. *Id.* at 374. Similarly, § 1367(b) makes clear that a plaintiff cannot sue only diverse parties and defer claims against non-diverse parties until they are joined under Rules 19 and 20 or intervene under Rule 24. Nor can persons who would destroy diversity jurisdiction join a suit as plaintiffs or intervenors under Rule 19 and Rule 24, respectively.

The codification does alter pre-existing case law with respect to ancillary jurisdiction in diversity cases in one respect, but that change *reduces* the pre-existing scope of supplemental jurisdiction. Before § 1367 was enacted, federal courts with diversity jurisdiction were permitted to take ancillary jurisdiction over parties entitled to intervene of right under Federal Rule of Civil Procedure 24(a). See, *e.g.*, *Smith Petroleum Serv., Inc.* v. *Monsanto Chem. Co.*, 420 F.2d 1103, 1113-15 (5th Cir. 1970). In § 1367(b), Congress rejected this judicial judgment, in favor of narrowing diversity jurisdiction.

In sum, § 1367(b)'s provisions manifest a clear intent to prevent plaintiffs from using § 1367 to circumvent § 1332. If § 1367(a) is read to authorize courts with diversity jurisdiction to exercise supplemental jurisdiction only when doing so does not destroy that original diversity jurisdiction, then the parts of § 1367 work together harmoniously. They prevent the filing of a civil action that does not satisfy § 1332, including any class action, and foreclose the subsequent addition of parties whose participation contravenes § 1332.

In contrast, if § 1367(a) is interpreted to authorize supplemental jurisdiction over unnamed plaintiffs whose claims do not meet the minimum-amount requirement, the

statute as a whole will have far-reaching consequences – consequences Congress said it did not intend.

The most notable of these absurd consequences would be the wholesale revision of the limits on diversity jurisdiction embodied in this Court's interpretations of § 1332. Included in this revolution in federal diversity jurisdiction would be the demise of a rule that has endured for two centuries – the *Strawbridge* rule that in a multi-party civil action, the court has original jurisdiction only if the parties are completely diverse and each party satisfies the minimum-amount requirement. See *Strawbridge*, 7 U.S. (3 Cranch) at 267-68. Section 1367(b) does not expressly forbid a court with diversity jurisdiction to exercise supplemental jurisdiction over plaintiffs who are subsequently joined in an action under Rule 20. Thus, if § 1367(a) is interpreted to authorize a court to exercise supplemental jurisdiction over plaintiffs whose claims do not satisfy § 1332, one plaintiff whose claim satisfies those requirements can file a complaint, and then be joined pursuant to Rule 20 by numerous others whose complaints do not.

Petitioner's reading of § 1367(a) prevents this result by recognizing that once the additional plaintiff is added, the court loses its "original jurisdiction" over the "civil action," which is the predicate for supplemental jurisdiction. If *Strawbridge* is to survive, the "original jurisdiction" of the court over "civil actions" required by § 1367(a) must be destroyed by the addition of noncompliant plaintiffs after the complaint has been filed. Neither the complete diversity nor the minimum-amount requirement has any meaning if a court with original diversity jurisdiction over a single plaintiff can exercise supplemental jurisdiction over all other plaintiffs whose claims satisfy neither.

The Eleventh Circuit's interpretation also results in an incoherent statutory structure. According to the lower court, Congress carefully prevented plaintiffs from circumventing § 1332's requirements at the complaint stage and by use of

Rules 14, 19 and 24, while allowing destruction of those requirements by permitting the subsequent addition of noncompliant plaintiffs under Rules 20 and 23. Under that interpretation, Congress intended to invite plaintiffs whose claims do not meet § 1332's requirements to join state-law actions in federal court, while simultaneously barring similarly-situated plaintiffs from joining or intervening in such actions under Rules 19 and 24. Accordingly, Congress is deemed to have relaxed § 1332's requirements for plaintiffs whose presence is not required (those joined under Rule 20), and to have refused to do so for plaintiffs whose presence is necessary for just adjudication (those not joined under Rule 19). As Judge Easterbrook inquired, "What sense can this make?" *Stromberg Metal Works, Inc.* v. *Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996).

Lower courts have acknowledged that, in light of § 1367(b), reading § 1367(a) to authorize courts with original diversity jurisdiction to exercise supplemental jurisdiction over plaintiffs whose claims do not satisfy § 1332 has the absurd consequences detailed above, and yet have nonetheless felt constrained to accept those consequences. These courts read § 1367(a) to authorize supplemental jurisdiction to the full extent permitted by the Constitution whenever a court had original jurisdiction over any claim, and thus read § 1367(b) as the exclusive source of restrictions of the scope of supplemental jurisdiction in diversity cases. Because neither Rule 23 nor Rule 20 appears in § 1367(b)'s list of exceptions to supplemental jurisdiction, these courts have concluded that they have supplemental jurisdiction over unnamed class members and other plaintiffs who do not satisfy § 1332. App. 76a.

As shown above, however, § 1367(a) authorizes supplemental jurisdiction only over civil actions within the court's original jurisdiction. In diversity cases, the court's original jurisdiction is defined by § 1332, as interpreted by this Court, and it does not include, *inter alia*, class actions in

which unnamed plaintiffs do not satisfy the minimum-amount requirement. See *Zahn*, 414 U.S. at 294-96; *Snyder*, 394 U.S. at 336-38; *Clark*, 306 U.S. at 589-90. Thus, there was no reason to include Rule 23 (or Rule 20) in the list of aggregation/joinder mechanisms that could not be used to circumvent the diversity requirements of § 1332. Indeed, section 1367(b) simply makes sure that the plaintiffs excluded at the complaint stage by the gatekeeper (§ 1332 as incorporated in § 1367(a)'s requirement of original jurisdiction), are not let in the back door.

In addition, as Judge Tjoflat suggested, the list of aggregation rules in § 1367(b) – a list intended to prevent circumvention of § 1332 – need not be read as exclusive. See App. 61a (rejecting the application of the "*expressio unius*" canon of statutory construction, and advocating instead a kind of *ejusdem generis* construction); *id.* at 61a n.30 ("[a] troubling question concerning § 1367(b) is whether a plaintiff may be able to evade many of these restrictions by simply including such people in the original complaint (or in an amended complaint), rather than making them parties through the specified rules. I am dubious that jurisdictional restrictions could be circumvented through such procedural ploys").[10]

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[10] Some lower courts have feared that § 1367 would be rendered meaningless if § 1367(a) were interpreted to require a federal court to have "original jurisdiction" over a diversity-based action in order to exercise supplemental jurisdiction over unnamed class members or other plaintiffs whose claims do not comply with § 1332. They believe that under such an interpretation, § 1367 would authorize a court to exercise supplemental jurisdiction only with respect to claims over which it already has jurisdiction. That is not true.

First, *Finley* casts doubt on whether federal courts could exercise any supplemental jurisdiction without a statutory authorization. Section 1367 provides such an authorization, a substantial act in and of itself. Second, § 1367(a) authorizes a court with "original" federal-question jurisdiction

Taken as a whole, § 1367 is best read to say that in diversity actions, federal courts do not have supplemental jurisdiction over those whose complaints do not meet the minimum-amount requirement. The absurd results arising from the Eleventh Circuit's interpretation of § 1367 militate strongly against its adoption. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (absurd results weigh heavily against particular reading of statutory text). In contrast, if, as petitioner contends, § 1367(a) does not authorize federal courts sitting in diversity to exercise supplemental jurisdiction over persons whose claims do not satisfy the minimum-amount requirement, then § 1367(b) simply prevents plaintiffs from later adding parties who also could not have been included at the outset under § 1332. This "sensible" and coherent reading of the text should be adopted. *Bank One Chi., N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996).

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to exercise supplemental jurisdiction over all state law claims arising out of the same case or controversy, including those claims that require the joinder or intervention of other parties. (That is, § 1367 overrules *Finley*, which held that courts with federal-question jurisdiction lack such supplemental jurisdiction over other parties, 490 U.S. at 546-47, 556.) Third, § 1367 codified pre-existing law with respect to § 1332 by authorizing courts with diversity jurisdiction to exercise supplemental jurisdiction over claims by defendants (including compulsory counterclaims, cross-claims, and third-party claims, Fed. R. Civ. P. 13(a), (g), 14(a), 18(a)), even when those claims are based in state law and could not be asserted in federal court as a matter of original jurisdiction. In addition, in diversity actions, supplemental jurisdiction would extend to "all claims asserted by plaintiffs in a defensive posture solely in response to a claim asserted against the plaintiff by some other party to the action," which would include compulsory counterclaims against the original defendant and "cross-claims and impleader claims against other parties to the action that are precipitated by the claim asserted against the plaintiff." Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 948-49 (1992).

3. Even assuming that the text and structure of § 1367 would permit the lower court's interpretation, established rules of statutory construction strongly support petitioner's reading of § 1367. There are four rules of statutory construction that, taken separately and in combination, compel the conclusion that petitioner's reading of § 1367 is the better one.

For more than a century, Congress has acted to narrow the scope of diversity jurisdiction. See *Snyder*, 394 U.S. at 339. Congress has done so by raising the minimum-amount requirement periodically, and by accepting the Court's restrictive interpretation of § 1332. For example, in 1989, just one year before § 1367 was enacted, Congress increased the minimum amount for diversity jurisdiction from $10,000 to $50,000. See H.R. Rep. No. 100-889, at 45 (1988) (estimating that the federal judiciary's diversity caseload might decrease as much as 40% as a result of the increase). As this Court explained:

> Congress has thus consistently amended the amount-in-controversy section and re-enacted the "matter in controversy" language without change of its jurisdictional effect against a background of judicial interpretation that has consistently interpreted that congressional enacted phrase as not encompassing the aggregation of separate and distinct claims. . . . [T]he settled judicial interpretation of "amount in controversy" was implicitly taken into account by the relevant congressional committees in determining, in 1958, the extent to which the jurisdictional amount should be raised. . . . Where Congress has consistently re-enacted its prior statutory language for more than a century and a half in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a "judge-made formula." [*Snyder*, 394 U.S. at 339.]

See also *Zahn*, 414 U.S. at 302 (had Congress intended to alter the minimum-amount requirement, "some express statement of that intention would surely have appeared" in amending § 1332 or in the legislative history of such amendments); *Kroger*, 437 U.S. at 374 (the longevity of the complete diversity rule "clearly demonstrates a congressional mandate" for the rule).

Nothing in § 1367 indicates – let alone clearly expresses – a congressional intent to alter the minimum-amount requirement in any diversity case, and certainly not in the class action setting. Indeed, the statute as a whole strongly conveys the opposite meaning.

Second, in the diversity-jurisdiction setting, federal courts are empowered to adjudicate state law claims – *viz.*, claims that presumptively should be left to state tribunals. See *Speiser* v. *Randall*, 357 U.S. 513, 523 n.7 (1958) (reciting the "basic constitutional principle that the construction of state laws in the exclusive responsibility of the state courts"). Indeed, in *Snyder*, this Court indicated that its reluctance to expand the federal courts' diversity jurisdiction stemmed at least in part from respect for state sovereignty. As the Court said: "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [§ 1332] has defined.'" 394 U.S. at 340 (quoting *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934)).

The Eleventh Circuit's interpretation of § 1367 would substantially increase the scope of diversity jurisdiction. In nearly all cases, one of the parties would prefer a federal forum, with the consequence that where a class representative or plaintiff in a multi-plaintiff case satisfies § 1332, that case will end up in federal court. The state courts' historic power to decide state-law claims should not be so thoroughly displaced absent some clear statement of Congress. See *id.* (in light of *Ben-Hur*, "[t]o allow aggregation of claims where only one member of the entire class is of diverse citizenship

could transfer into the federal courts numerous local controversies involving exclusively questions of state law"); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (Congress must make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States) (quotations omitted). Plainly, section 1367 should not be given the expansive interpretation that plaintiffs advocate.

Third, jurisdictional limitations ensure that the federal courts do not upset the balance of power among the branches of the federal government by "keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG*, 526 U.S. at 583. In manifesting its respect for Congress' role in defining federal court jurisdiction, this Court has routinely recognized the delicacy of the fact that "the courts themselves must decide whether their own jurisdiction has been expanded." See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985). In this setting, in order to conclude that Congress "enhanced" federal court jurisdiction, the Court has required "the clearest indications" from Congress of its decision to do so. *Id.*

Finally, the court of appeals' interpretation of § 1367 assumes that Congress overruled *Zahn*. This Court does not permit the lower courts to infer that it has implicitly overruled one of its decisions. See *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Nor should a congressional overruling of a Supreme Court decision be lightly inferred, particularly where, as here, Congress has enacted a new federal statute accompanied by an uncontested congressional report explicitly declaring Congress's intent to preserve that decision. See *infra at* I.B.

These principles of statutory interpretation, separately and in combination, show that the text of § 1367 should be interpreted to authorize supplemental jurisdiction in diversity cases only where its exercise "consistent with the requirements of § 1332."

B. The Legislative History Of § 1367 Conclusively Establishes Congress's Intent To Preserve *Zahn* And The Minimum-Amount Requirement.

What we have said so far demonstrates that based on its text and structure and established principles of statutory interpretation, § 1367 does not authorize federal courts sitting in diversity to exercise supplemental jurisdiction over unnamed class members whose claims do not satisfy the minimum-amount requirement. The legislative history conclusively demonstrates that this was Congress's intent. The pertinent House Report states that § 1367 "*is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley.* [n.17]" House Report at 29 (emphasis supplied). And, note 17 expressly cites and preserves *Zahn*. The Senate adopted the House Report. Rarely does the section-by-section analysis of the pertinent, uncontroversial committee report so directly address the precise legal issue presented by a case.

A longer exposition of the legislative history leads inexorably to the same conclusion. Section 1367 originated in a report written by the Federal Courts Study Committee, a body established by Congress in 1988. See 28 U.S.C. § 331 (1988). That committee conducted "the most comprehensive examination of the federal court system in the last half century," and recommended more than 100 changes in the administration of the federal courts. See Fed. Courts Study Comm., 101st Cong., *Report of the Federal Courts Study Committee* 3, 171-86 (Comm. Print 1990) ("Study Committee Report").

Specifically, the Study Committee Report found that one of the most serious problems confronted by the federal judiciary was its immense and growing docket, considered by the Committee to be a "crisis." *Id.* at 4-10. A primary source of this crisis was the federal courts' diversity jurisdiction, which was threatening the accessibility of the federal courts to

federal claimants. *Id.* at 14. The Committee recommended that Congress reduce the scope of diversity jurisdiction.[11] Relevant here, in doing so, the Committee rejected a proposal by a subcommittee that *Zahn* be overruled. See 1 Fed. Courts Study Comm., *Working Papers and Subcommittee Reports* 561 n.33 (July 1, 1990), *discussed in Meritcare, Inc.* v. *St. Paul Mercury Ins. Co.*, 166 F.3d 214, 219 (3d Cir. 1999).

While the Study Committee was doing its work, this Court decided *Finley* v. *United States*, 490 U.S. 545 (1989). In that case, the Court held that a court with federal question jurisdiction over a Federal Tort Claims Act claim against the United States did not have "pendent party" jurisdiction over the plaintiff's state-law claims against other defendants, and indicated that extensions of pendent and ancillary jurisdiction should receive express congressional authorization. *Id.* at 546-47, 556. This decision was seen as "surprising" because most lower courts had concluded that federal district courts had pendent party jurisdiction in federal-question cases, and because some perceived it as a threat to any judge-made law concerning ancillary or pendent jurisdiction. 13B Wright et al., *Federal Practice and Procedure* § 3567.2, at 80-81 (Supp. 2004).

As a result, after *Finley*, the Federal Courts Study Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the 'same transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties." Study Committee Report at 47, *quoted in Raygor* v. *Regents*

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[11] Indeed, the Committee proposed the abolition of diversity jurisdiction except in a limited set of cases. *See* Study Committee Report at 38-45. In the alternative, the Committee recommended the significant curtailment of diversity jurisdiction in several ways, including raising the amount in controversy requirement to $ 75,000. *Id.* at 42.

of Univ. of Minn., 534 U.S. 533, 540 (2002). See also Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L. J. 849, 859 (1992) ("the apparent thrust of the Committee's recommendation was that Congress formally codify the existing doctrines of pendent claim and ancillary jurisdiction and authorize pendent party jurisdiction in federal question cases").

H.R. 5381, entitled "Federal Court Study Committee Implementation Act of 1990," which was introduced in the House of Representatives in July 1990. Section 120 of that bill addressed supplemental jurisdiction, but it differed significantly from the version later enacted. In particular, on September 6, 1990, Judge Weiss, the Chair of the Study Committee, testified before a subcommittee of the House Judiciary Committee and objected to § 120 as inconsistent with the Study Committee's recommendations regarding supplemental jurisdiction because it expanded diversity jurisdiction. See *Federal Court Study Committee Implementation Act & Civil Justice Reform Act: Hearings on H.R. 5381 & H.R. 3898 Before the Subcomm. on Courts, Intellectual Property & the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 92-94 (1990) (statement of Judge Joseph F. Weis, Jr.). He explained that § 120 would "change the doctrine of complete diversity articulated in *Strawbridge* v. *Curtiss*, 3 Cranch 267 and *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978)" and that "[t]he Study Committee did not intend to encourage additional diversity litigation." *Id.* at 94. He urged the Committee to treat federal question and diversity cases differently and to reduce the scope of § 120 to reflect the Study Committee's view that "the requirement of complete diversity in § 1332 cases should be continued as it presently exists and should not be eroded through operation of the proposed supplemental jurisdiction." *Id.* at 95.

H.R. 5381 was then redrafted and emerged with a wholly different supplemental jurisdiction provision, now § 114. See H.R. 5381, 101st Cong., § 114 (Sept. 27, 1990); *id.* (Oct. 2, 1990). This is the provision enacted as § 1367.

The House Report on redrafted H.R. 5381 stated that "[t]he purpose of H.R. 5381 is to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." House Report at 15; see also *id.* (describing provisions as "modest proposals that, but for the work of the Federal Courts Study Committee, might not have come to the attention of Congress at all"). Section 114 (now § 1367) was described as "implement[ing] a recommendation of the Federal Courts Study Committee." *Id.* at 27.

More substantively, the House Report noted that "in *Finley* v. *United States*, 109 S. Ct. 2003 (1989) [490 U.S. 545 (1989)] the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction." *Id.* at 28. The House Report states that *Finley* "threatens to eliminate other previously accepted forms of supplemental jurisdiction," citing as an example the dismissal of an impled defendant who was not diverse. *Id.* at 28 & n.14. Thus, the House Report explained that § 1367 "essentially restore[d] the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction." *Id.*

The House Report then details that pre-*Finley* understanding in terms that are precisely on point and worth quoting in full:

> In federal question cases, [§ 1367] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties. *In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute* . . . .

[Section 1367(a)] generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that provide the basis of the district court's original jurisdiction. [n.15] In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley* v. *United States*.

[Section 1367(b)] prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances. [n.16] In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdiction requirement of 28 U.S.C. § 1332 by the simple expedient of naming *initially* only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. In accord with case law, the subsection also prohibits the joinder or intervention of persons a[s] plaintiffs if adding them is inconsistent with section 1332's requirements. *The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to Finley*.[n.17].

. . . .

[n.17] *See Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 [] (1921); *Zahn* v. *International Paper Co.*, 414 U.S. 291 [] (1973). [House Report at 28-29 & n.17 (emphasis supplied).]

The House Report goes on to note that § 1367(b) does alter pre-*Finley* practice in one "small" respect by excluding Rule 24(a) intervenors whose intervention is not consistent with complete diversity. *Id.* at 29.

The Senate Judiciary Committee adopted the House Report. See 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990).

One point is critical. Far from suggesting any change in *Zahn*, the legislative history in the form of an uncontroversial committee Report points in precisely the opposite direction – *viz.*, it states that the minimum-amount requirement for diversity jurisdiction under § 1332 is unchanged, that § 1367 should not be interpreted to contravene § 1332, and that § 1367 does not overrule *Zahn*. The legislative history should be treated as compelling not only because it supports the best reading of the text and is clear and one-sided, but also because committee reports are considered by this Court to be an authoritative source of congressional intent. See *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[ts] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation'") (quoting *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)).

The legislative history unequivocally demonstrates both a general congressional intent to limit diversity jurisdiction and a specific congressional intent to preserve *Zahn*. Petitioner submits that the text and structure of § 1367 clearly support its reading of § 1367; but even if they did not, the court of appeals' reading should be rejected because it "produce[s] a result demonstrably at odds with the intentions of its drafters," and in that circumstance, "the intention of the drafters, rather than the strict language, controls." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Cf. *Koons Buick Pontiac*, No. 03-377, slip op. at 13 ("there is

scant indication Congress meant to change the well-established meaning of [the statute]").

In sum, § 1367 "overrule[s] *Finley* in federal-question cases but . . . enable[s] the federal courts to retain the pre-*Finley* rules of diversity jurisdiction, in keeping with the views outlined in the House Report that accompanied the statute." Pfander, *supra*, at 128.

II. THE JUDGMENT SHOULD BE VACATED BECAUSE THE COURT WAS WITHOUT POWER TO ACT.

1. If *Zahn* is the law, the district court lacked jurisdiction over this class action. The class was defined to include members who did not satisfy the minimum-amount requirement, and the district court certified this class and then tried and decided this case based on the erroneous assumption that it had subject-matter jurisdiction over the class and the case. But, the courts below never had power in this case, and the judgment entered must now be vacated. See *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 16-19 (1951) (vacating judgment where diversity jurisdiction did not exist at the time of the judgment); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 76-77 (1996) ("if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated").

Any other result would rob *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), of vitality. There, this Court held that a federal court must first decide a contested issue of subject-matter jurisdiction before otherwise proceeding with a case. *Id.* at 109-10. That is because the courts are without power to act if they lack jurisdiction, and jurisdiction may be neither presumed nor retroactively conferred. See *Finn*, 341 U.S. at 18; Fed. R. Civ. P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). Cf. *Caterpillar*, 519 U.S. at 77 (affirming judgment even though the district

court lacked jurisdiction when the case was removed to district court *because "no jurisdictional defect lingered through judgment in the District Court"*) (emphasis supplied).

Moreover, this is not one of those cases where an "[a]ppellate-level amendment[] to correct [a] jurisdictional defect[]" is permissible. *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 836 (1989). This Court has recognized that such amendments are not "intellectually satisfying" because, in essence, they retroactively ratify judicial acts that the court was without power to take. *Id.* at 836-37. And, the Court has noted that such amendments may be used only "sparingly" – *e.g.*, where a dismissal of the suit would simply result in the suit being "refile[d] in the District Court" and "proceed[ing] to a preordained judgment." *Id.* at 837. The Court has admonished, however, that where "the dismissal of the nondiverse party will prejudice any of the parties in the litigation" or where "the presence of a nondiverse party produced a tactical advantage of one party or another," the case should be remanded so that the district court could make a determination of the prejudice to the defendant and decide how to proceed. *Id.* at 838.

Here, it is evident that the presence of the non-diverse parties "produced a tactical advantage" for plaintiffs and prejudiced petitioner in numerous respects. Most obviously, as a general matter, the tactics of class action litigation differ substantially from the tactics of multi-party litigation; and, more specifically, those tactics are also affected by the size of the class proposed to be certified. The definition and certification of a massive class creates an enormous tactical advantage for plaintiffs. It affects virtually every litigation choice made; indeed, it places intense pressure on a defendant to settle. See, *e.g, Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). In addition, the class definition here altered the proof of liability and damages in this case. The sole evidence offered on this topic was expert testimony based on data aggregated from *all* national Exxon dealers, not just the

differently-situated larger dealers over whom the court would have had jurisdiction. See *infra*. Had a lawful class been defined, plaintiffs' expert could not have relied on the aggregated, national data to establish that Exxon violated its contracts with individual dealers or to compute the amount of such damage.

The judgment should therefore be vacated, and the case remanded to the district court to be dismissed. Plaintiffs would, of course, be free to attempt to file a new case over which the court would have subject-matter jurisdiction.

2. The prejudice and tactical advantage resulting from the wrongful assumption of subject-matter jurisdiction over the class action can be concretely illustrated by two examples.

a. First, a class certification inquiry is based on a class defined in a particular way. If the defined class is unlawful, the class must be redefined and the Rule 23 standards must be applied to the new class. Thus, if plaintiffs choose to file a new case, they must lawfully define a class, and then the court will have to assess whether a lawfully-defined class can be certified under the standards set forth in Rule 23. Clearly, the "old" certification inquiry is no longer valid.

The court below applied Rule 23 to a class defined to include all U.S. Exxon dealers who operated during a certain time period. That class definition cannot survive a determination that the federal courts lack jurisdiction over the numerous class members whose claims do not satisfy the minimum-amount requirement. Instead, if a new complaint were to be filed and a new class defined, the court would have to consider whether a class defined to exclude all dealers whose claims do not satisfy the minimum-amount requirement can be certified as a Rule 23(b)(3) class for damages. Such a class presents, at the very least, significantly different issues of manageability and superiority than does the more simple class definition of all dealers who operated within a particular time period.

The necessity for vacatur of the class certification is evident in this Court's decision in *Zahn*, affirming the lower courts' refusal to certify any class once it became clear that the court had subject-matter jurisdiction over named plaintiffs, but not over numerous unnamed plaintiffs. See 414 U.S. at 302. Indeed, the district court in *Zahn* immediately grasped how the jurisdictional question would impact the class-certification ruling. When it confronted the propriety of allowing the proceedings in *Zahn* to move forward as a class action, the district court observed that it had "initially [to] determine whether there is jurisdiction over all the members of the proposed class." *Zahn* v. *International Paper Co.*, 53 F.R.D. 430, 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973). After observing that it was clear that some putative class members' claims would not satisfy the jurisdictional amount, and following a thorough and detailed analysis of *Snyder* and other cases, the court concluded that each member of the class must individually satisfy the jurisdictional amount. *Id.* at 432. Only at that point did the court assess whether a viable class existed. *Id.* at 433-34.

The reason is simple and commonsensical: only after the plaintiff class is defined can a court grasp the actual hurdles to permitting the case to proceed as a class action. The *Zahn* district court understood that the rule requiring each class member to satisfy the amount in controversy requirement substantially impacts the manageability of the case as a class action, and its superiority to other methods of adjudication, and therefore that the scope of the court's subject-matter jurisdiction had to be resolved before the class-certification question could be decided. And, once the court recognized that it lacked subject-matter jurisdiction over unnamed class members, it proceeded to analyze the class defined to exclude such class members and concluded that no such class should be certified.

The litigation in this case, too, illustrates why a court must assess its subject-matter jurisdiction before making substantive decisions about class certification. Indeed, the proceedings that led to the class certification in this case were wholly inconsistent with *Steel Company*, where this Court held that a federal court must decide whether it has subject-matter jurisdiction before otherwise proceeding with a case. When the district court was considering whether to certify the class in this case, Exxon argued, *inter alia*, that the class should not be certified because certain absent class members' claims were insufficient to meet the jurisdictional amount, and hence the court lacked subject-matter jurisdiction over such a broad class under *Zahn*. The magistrate (whose reasoning and recommendation to certify the class was accepted by the district court, App. 222a) noted the subject-matter jurisdiction issue, but believed that he could proceed with the litigation while postponing the question whether absent class members' claims satisfied the jurisdictional amount. *Id.* at 244a (citing *Kaiser Gypsum Co.* v. *Kelley* (*In re School Asbestos Litig.*), 921 F.2d 1310, 1316 (3d Cir. 1990), and *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1195-96 (6th Cir. 1988)).

The procedure employed, however, was flatly contrary to *Steel Co.* which reaffirmed the longstanding rule that "'[w]ithout jurisdiction the court cannot proceed at all in any cause.'" 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (alteration in original) (quoting *Mansfield, C. & L.M.R. Co.* v. *Swan*, 111 U.S. 379, 382 (1884)). The district court had an obligation to ensure that it had subject-matter jurisdiction before proceeding with any other aspect of the case, including the class certification. Cf. *Schacht*, 524 U.S. at 388 ("A *case* falls within the federal district court's 'original' diversity

'jurisdiction' only if diversity of citizenship among the parties is complete . . . .") (emphasis supplied). Instead, the district court ruled on class certification before determining whether it had subject-matter jurisdiction, doing precisely what *Steel Co.* prohibits.[12]

"Much more than legal niceties are at stake here." 523 U.S. at 101. Where, as here, the district court defers the jurisdictional question, it alters and distorts the class-certification analysis. And, that in turn distorts the entire course of litigation in numerous ways. We demonstrate below that the erroneous certification of a class over which the court lacked jurisdiction allowed plaintiffs to prove their case and quantify damages with aggregated national data that they could not have relied on had a lawfully limited class been defined and certified. In addition, there are practical considerations that strongly support deciding the subject-matter jurisdiction question prior to class certification.

As noted, class certification fundamentally alters a defendant's litigation tactics in a case. Most notably, it

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[12] As noted, this Court has held that Fed. R. Civ. P. 21 authorizes the federal courts to dismiss nondiverse, dispensable parties at any point in the litigation if the presence of such a party would destroy the federal court's subject-matter jurisdiction over the case. *Newman-Green, Inc.*, 490 U.S. at 832-38. *Newman-Green*, decided before *Steel Co.*, merely allows the federal courts to retain a case when, through oversight, a party whose presence destroys jurisdiction was permitted to participate in the case, and the other party was not thereby prejudiced. *Id.* at 828 (jurisdictional defect was not noted or considered until oral argument in the court of appeals). Moreover, Rule 21 applies only to "misjoinder" of parties and has nothing to do with class certification orders under Rule 23 which do not involve "joinder" at all. Nothing in *Newman-Green* suggests or authorizes a district court to set aside a known jurisdictional question, and postpone it until after it proceeds with other matters in the case. *Steel Co.* squarely addresses that question, and leaves no room for doubt how a district court should proceed. The court should resolve the jurisdictional question *before* ordering the class certified.

significantly increases the immense financial pressure on a defendant to settle a multi-plaintiff case. *Coopers & Lybrand*, 437 U.S. at 476. Any defendant who settles class litigation will do so only in exchange for peace and finality. But dismissal of a class action with prejudice is effective only to the extent the court had jurisdiction over the case. *Costello* v. *United States*, 365 U.S. 265, 285 (1961) ("fundamental jurisdictional defects which render a judgment void and subject to collateral attack [include] lack of jurisdiction over the ... subject matter"). A substantial question whether all members' claims satisfy the jurisdictional amount is thus a significant barrier to the settlement of class actions. Indeed, it is not difficult to imagine a successor *class* action of putative plaintiffs claiming to have been damaged by less than the jurisdictional amount. Petitioner lost the opportunity to litigate and to settle this case based on a lawful delineation of the scope of the court's subject-matter jurisdiction.

Class-certification decisions determine the course of litigation and have a profound effect on litigation tactics. This case was litigated on the basis of, and necessarily affected by, the unlawfully defined class. The judgment in this case must be vacated.

b. The district court's decision to allow the case to proceed as a class including *all* dealers, even those whose claims do not satisfy the jurisdictional amount, distorted the trial and judgment in this case in another way. The plaintiffs' underlying liability theory was predicated on expert testimony that assumed *all* dealers were properly asserting claims before the court and that relied on national average data that, by definition, described all U.S. Exxon dealers in the aggregate before and after the DFC program through 1988. Tr. 2668. Finding that the national average margins of Exxon dealers declined both as an absolute matter and as compared to competitor dealers' margins during the same period, plaintiffs' expert opined that the Exxon dealers' absolute and relative decline must have been caused by the elimination of

the DFC offset, thereby "proving" that the offset had been eliminated. Tr. 2667-71, 2678-87.

But if plaintiffs' expert had been asked to analyze Exxon's liability to its large-claim dealers, it is impossible to know whether the result would have been the same – whether, that is, the dealers properly included in the class would have shown the same decline in absolute and relative margins as the erroneous class of all dealers. If a lawfully-defined class had shown no decline, or a substantially smaller decline, plaintiffs' expert could not have concluded that the DFC offset "must have been eliminated" for those dealers. In fact, plaintiffs' expert could not have applied his analysis at all to a class properly defined to include only those dealers with large volumes and claims, because the pre-1988 data set on which he relied does not include information on an individual dealer basis. Tr. 3551-52.[13] It is thus impossible to know how plaintiffs would have proved their case if a lawfully-defined class had been certified, and the national average margin data could not be used. Plaintiffs potentially would have had to prove their cases based on some other statistical or individualized showing of harm, rather than on a sweeping presumption derived from national aggregate data.

Plaintiffs' liability theory depended on expert testimony that was predicated on the erroneous class definition in another respect as well. A fundamental element of plaintiffs' theory was that Exxon sought to separate Exxon's profitable

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[13] The inability to analyze pre-1988 data for only part of the class also would have fatally infected his analysis of the 1988-1994 period, which merely examined whether Exxon's margins changed so as to suggest a "give-back" of the offset, *assuming* it had been eliminated based on the analysis of the pre-1988 data. Tr. 2684-87. Accordingly, the expert opinion linchpin of plaintiffs' case – that the DFC offset must have been eliminated because of the decline in Exxon dealers' margins – would not have been presented to the jury, had the case been tried with a properly defined class.

dealers from its "[m]arginal stores" – its "keepers" from its "non-keepers." Tr. 4343-44, 4389; Op. to Cert. 5. Plaintiffs argued that Exxon wanted to "pick and choose" from among its dealers, strengthening the "keepers" while forcing the demise of the less-profitable "non-keepers." Op. to Cert. 5.

To support that theory, plaintiffs' expert compared the attrition in Exxon dealers across the class with the attrition in dealers experienced by Exxon's competitors. Tr. 2705-12. Finding that Exxon's dealer attrition rate was higher than its competitors', plaintiffs' expert concluded that Exxon must have been consciously trying to force out the more marginal class members. *Id.* at 2711-13. Again, however, if plaintiffs' expert had analyzed only the claims of dealers properly included in this action, it is impossible to know whether the attrition rate among Exxon dealers would have been higher than the rate among its competitor dealers. If anything, the opposite inference is more plausible. The dealers excluded from the class would surely include many of the marginal dealers supposedly squeezed out by Exxon; accordingly, the attrition rate among the properly included dealers should be lower than the rate among all dealers. The analysis by plaintiffs' expert of the improperly defined, overinclusive dealer class thus necessarily infected plaintiffs' underlying liability claims.

In light of the way plaintiffs sought to prove their case, the jurisdictional ruling in this case almost certainly had a substantial effect on the jury's judgment and award. For this reason, too, this Court should vacate the judgment.

Because the district court lacked subject-matter jurisdiction, it was without power to either certify the class or enter the judgment in this case. The judgment is therefore a nullity and should be vacated.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

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